

BEFORE THE  
**Federal Communications Commission**  
WASHINGTON, D.C. 20554

<b>Herring Broadcasting, Inc., d/b/a WealthTV,</b>	)	
	)	
<b>Complainant,</b>	)	
	)	
v.	)	<b>MB Docket No. 08-214</b>
	)	<b>File No. CSR-7709-P</b>
	)	
<b>Time Warner Cable Inc.,</b>	)	
	)	
<b>Defendant</b>	)	

To: Chief, Media Bureau

**OPPOSITION TO HERRING BROADCASTING, INC.’S  
MOTION FOR REVOCATION OF HEARING DESIGNATION**

Time Warner Cable Inc. (“TWC”), by its counsel, hereby opposes the Motion for Revocation of Hearing Designation (“Motion”) filed by Herring Broadcasting, Inc., d/b/a WealthTV (“WealthTV”) in this proceeding. As explained below, the Motion is unprecedented, unauthorized and procedurally defective. Unhappy with the Administrative Law Judge’s (“ALJ’s”) interlocutory ruling issued on November 20, 2008,<sup>1</sup> WealthTV seeks to have the Media Bureau take the extraordinary step of completely usurping the ALJ’s jurisdiction over this proceeding and granting relief to WealthTV based on the record as it existed when the Hearing Designation Order (“HDO”) was issued – something the Media Bureau already expressly concluded it was unable to do.<sup>2</sup> Allowing parties to an ongoing administrative hearing to seek

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<sup>1</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Memorandum Opinion and Order of Arthur I. Steinberg, FCC 08M-47, MB Docket 08-214 (rel. Nov. 20, 2008) (“November 20 MO&O”).

<sup>2</sup> *See In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Memorandum Opinion and Hearing Designation Order, DA 08-2269, MB Docket 08-214 (rel. Oct. 10, 2008) (“HDO”), *as modified by Erratum* (rel. Oct. 15, 2008), at ¶ 7 (finding that “...the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims.”)

revocation of an HDO every time the ALJ issues an interlocutory ruling unfavorable to that party would make a mockery of the hearing process and violate the Communications Act, the Administrative Procedure Act, and fundamental due process guaranteed by the Constitution. WealthTV's Motion must be denied.

## ARGUMENT

### I. The Motion Is An Unauthorized Attempt To Circumvent Commission Procedures For Review Of An ALJ's Interlocutory Ruling.

In its *Second Program Carriage R&O*, the Commission concluded that “most program carriage complaints will require an administrative hearing to evaluate contested facts related to the parties’ specific negotiations.”<sup>3</sup> In the instant proceeding, following a lengthy review of the pleadings and supporting documentation, the Media Bureau determined that relief could not be granted on the existing record, but rather that there remained “several factual disputes as to whether TWC... discriminated against WealthTV” on the basis of affiliation or non-affiliation.<sup>4</sup> Accordingly, consistent with WealthTV’s own specific requests,<sup>5</sup> the Media Bureau issued the HDO directing that an ALJ “resolve all factual disputes and submit a recommended decision and remedy, if appropriate.”<sup>6</sup>

Under the Commission’s rules and precedents, an ALJ has unquestioned “plenary authority to regulate the course of [a] hearing” committed to its jurisdiction.<sup>7</sup> Thus, once the

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<sup>3</sup> *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, ¶ 24 (1993) (“*Second Program Carriage R&O*”).

<sup>4</sup> HDO at ¶ 58.

<sup>5</sup> See *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Carriage Agreement Complaint of Herring Broadcasting, Inc. d/b/a WealthTV Against Time Warner Cable Inc., CSR-7709-P (filed Dec. 20, 2007), at 28; see also Complainant’s Reply to Answer of Defendant Time Warner Cable Inc. in Support of its Complaint, CSR-7709-P (filed Feb. 25, 2008), at 3-4, 9, 14, 20 and 22.

<sup>6</sup> HDO at ¶ 124.

<sup>7</sup> *Industrial Business Corp.*, Decision, 47 FCC 2d 891, ¶ 6 (Rev. Bd. 1974). See also, *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, TWC Reply to Opposition to Motion for Modification and Clarification or, in the Alternative, for Certification of Questions, MB Docket 08-214 (filed Nov. 3, 2008), at 8; *Selma Television, Inc.*,

Presiding Judge was designated pursuant to the HDO,<sup>8</sup> all of the procedural and substantive issues arising in the proceeding are governed by that ALJ, not the Media Bureau. In particular, under Section 1.301 of the Commission's rules, only certain types of interlocutory rulings are appealable as of right,<sup>9</sup> while all other interlocutory appeals may be filed only if allowed by the Presiding Judge.<sup>10</sup> Although WealthTV acknowledges that the filing of the Motion was triggered by such an interlocutory ruling – specifically, the November 20 MO&O, which, *inter alia*, modified the HDO's designation of issues and hearing timeframe – WealthTV has neither raised any issues that are appealable as of right under Section 1.301(a) nor requested authority from the Presiding Judge to file the Motion, as required under Section 1.301(b).

The ALJ's November 20 MO&O is not appealable as of right under Section 1.301(a). Sections 1.301(a)(2)-(5) are clearly inapplicable to this situation, and WealthTV does not suggest otherwise. Similarly, the November 20 MO&O clearly is not a ruling that “denies or terminates the right of any person to participate as a party to a hearing proceeding” under Section 1.301(a)(1), since WealthTV's right to participate in the hearing continues unabated. Indeed, the relief requested by WealthTV would have the perverse effect of terminating the right of both TWC and WealthTV to participate in the hearing, and thus would turn Section 1.301(a)(1) on its head. Similarly, there is no basis for a discretionary interlocutory appeal of the November 20

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Memorandum Opinion and Order, 3 FCC 2d 63 (Rev. Bd. 1966). The November 20 MO&O was issued pursuant to the Presiding Judge's authority, upon a showing of “good cause,” to grant continuances and extensions of time for “any act required or allowed to be done within a specified time” unless the time for performance “is limited by statute.” 47 C.F.R. § 1.205. The “good cause shown” for the November 20 MO&O was the due process concerns raised by the provision in the HDO setting a 60-day deadline for the adjudication of six distinct cases (the four separate WealthTV complaints against four cable operators, and the separate NFL and TCR complaints against Comcast), each of which has its own peculiar facts and which do not have all parties in common. It is beyond dispute that there is no statutory requirement that the proceeding be completed within 60 days.

<sup>8</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Order of Richard L. Sippel, FCC 08M-43, MB Docket 08-214 (rel. Oct. 22, 2008).

<sup>9</sup> 47 C.F.R. § 1.301(a).

<sup>10</sup> 47 C.F.R. § 1.301(b).

MO&O under Section 1.301(b) and WealthTV did not even follow the required procedures for such an appeal by requesting permission from the ALJ. Having failed to satisfy the requirements of Section 1.301, the Motion must be dismissed on that basis alone.

Moreover, WealthTV also has failed to demonstrate that it would be harmed by permitting the case to proceed as directed by the Presiding Judge. Indeed, as Judge Steinberg recognized (based on his more than 32 years of experience as a trial attorney and ALJ), “it would be impossible to develop a full and complete record and afford the parties their due process rights within the 60-day timeframe contemplated in the HDO,” and “[t]hus, the public interest would be better served, and the scarce resources of the Commission would be better utilized, by allowing an adequate period of time, *ab initio*, to litigate these cases fully and properly.”<sup>11</sup>

Finally, although not raised by WealthTV, TWC understands that the Commission has indicated that it might consider an appeal of an interlocutory ALJ order that is not contemplated by Section 1.301 upon a showing of “clear error or flagrant abuse of discretion that would inevitably result in reversal of the initial decision.”<sup>12</sup> WealthTV’s Motion fails under this standard as well. Regardless of which party prevails under the ALJ’s recommended decision, the fact that the losing party was afforded full due process, the opportunity for discovery, and the ability to develop a “full and complete record” free from artificial and arbitrary time constraints would hardly provide a basis for appeal.<sup>13</sup> Indeed, the failure to conduct the proceeding in accordance with these fundamental tenets would “inevitably result in reversal,” not vice versa.

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<sup>11</sup> November 20 MO&O, at ¶ 7 and note 8.

<sup>12</sup> See *James A. Kay, Jr.*, 13 FCC Rcd 16369, ¶ 6 (1998), cited by Motion for Reconsideration of Hearing Designation Order, filed by TCR Sports Broadcasting Holding, L.L.P., MB Docket 08-214, filed November 26, 2008, at 3.

<sup>13</sup> As the Commission has noted, the courts have expressed concern that “accelerated procedures might sacrifice the careful performance of the Commission’s substantive tasks to mere speed.” *Son Broadcasting, Inc.*, 88 FCC 2d 635 (1981), at n.23, citing *Federal Broadcasting System v. FCC*, 225 F.2d 560, 567 (D.C. Cir. 1955) (“Speed of Commission action may in some cases point to a failure to make those essential findings which the agency must make. . .”).

## II. The Motion Is An Improper And Untimely Attempt To Seek Reconsideration Of The HDO.

Recognizing that it is unable to satisfy the requirements of Section 1.301 for the appeal of an interlocutory ruling, WealthTV requests that the Motion be treated as a petition for reconsideration of the HDO, and that it be granted a waiver to allow consideration of an untimely petition. However, Section 1.106(a)(1) of the Commission's rules plainly provides that petitions for reconsideration of HDOs will be entertained only if the petition "relates to an adverse ruling with respect to petitioner's participation in the proceeding."<sup>14</sup> As explained in the previous section, not only did the November 20 MO&O not adversely affect the right of WealthTV to participate in the proceeding, the relief sought by WealthTV would have precisely the opposite effect by terminating the participation rights of both TWC and WealthTV.<sup>15</sup>

Even if the Motion could be squeezed within the narrow exception in Section 1.106(a)(1) for petitions for reconsideration of an HDO, WealthTV's request nevertheless is untimely.<sup>16</sup>

While the Motion seeks a waiver of the filing deadline, it fails to demonstrate the requisite "good cause" for untimely consideration.<sup>17</sup> Indeed, Section 405 of the Communications Act of 1934, as

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<sup>14</sup> 47 C.F.R. § 1.106(a)(1).

<sup>15</sup> While WealthTV asserts that "making the litigation open-ended as to time and expense" adversely affects its participation in the hearing process, such that the Motion allegedly falls within the narrow exception provided in Section 1.106 of the Commission's rules governing the types of matters the Media Bureau can reconsider, such an argument fails for at least two reasons. Motion at 4. First, there is no support for the claim that the Presiding Judge intends for this case to be "open-ended" – in fact, the Presiding Judge has set a reasonable trial date with specific deadlines. See *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Procedural and Hearing Order, FCC 08M-50, MB Docket 08-214 (rel. Dec. 2, 2008). Second, WealthTV has offered no evidence to substantiate its claim that if its Motion is denied, it will be unable to prosecute its case and thus would be denied the ability to "participate."

<sup>16</sup> Section 1.106(f) of the Commission's rules provides that petitions for reconsideration must be filed 30 days after the date that the relevant order is released. See 47 C.F.R. § 1.106(f). Thus, the deadline for WealthTV to file a petition for reconsideration of the HDO was November 10, 2008. WealthTV's Motion was filed on November 24, 2008.

<sup>17</sup> Motion at 4, citing Section 1.3 of the Commission's rules. WealthTV does not provide any support for its allegation that the November 20 MO&O, which correctly concluded that it would be impossible to resolve the "extremely complex proceeding involving six separate program carriage complaints, three Complainants and four

amended,<sup>18</sup> commands that petitions for reconsideration must be filed within thirty days after the order is released, and courts have been strict on waivers of that provision, upholding them only in “extremely unusual circumstances.”<sup>19</sup> As the Court of Appeals for the D.C. Circuit has cautioned, the Commission’s rules are presumed valid, and an applicant for waiver faces a “high hurdle even at the starting gate.”<sup>20</sup> In general, waiver requests are granted only if “special circumstances warrant deviation from the general rule and such a deviation will serve the public interest.”<sup>21</sup> Further, if it grants a waiver, the Commission must articulate a rational justification for the exception that establishes a predictable, workable standard for non-discriminatory resolution of future cases.<sup>22</sup>

The fact that the November 20 MO&O was issued after the deadline for filing a petition for reconsideration of the HDO does not provide the requisite good cause for waiving that deadline. WealthTV was on notice well before November 20, 2008 that the Presiding Judge would not be bound by the 60-day deadline for resolution set forth in the HDO. To meet that deadline, the case would have to be resolved by December 9, 2008. Yet, even the original scheduling order issued by the Presiding Judge on October 23, 2008 did not contemplate meeting this schedule.<sup>23</sup> Furthermore, at a pre-hearing conference held on October 27, 2008, the Presiding Judge signaled that the recommended timetable in the HDO was not binding, expressly

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Defendants” within the 60-day timeframe set forth in the HDO (November 20 MO&O at ¶ 7) is “unusual” and is necessary “to afford fair recourse to the Media Bureau that crafted the designation...”

<sup>18</sup> 47 U.S.C. §405.

<sup>19</sup> *Virgin Islands Telephone Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993); *see also Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986).

<sup>20</sup> *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

<sup>21</sup> *Benedek License Corporation*, 13 FCC Rcd 18913 (MMB 1998).

<sup>22</sup> *WAIT Radio*, 418 F.2d at 1159.

<sup>23</sup> *See In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Order of Arthur I. Steinberg, FCC 08M-44, MB Docket 08-214 (rel. Oct. 23, 2008) (“October 23 Order”). That Order set December 10, 2008 – the 61<sup>st</sup> day after the issuance of the HDO – as the deadline for the filing of post-hearing reply briefs and offered no indication as to how soon a decision would be forthcoming after that date. Thus, the October 23 Order signaled the Presiding Judge’s obvious intent not to be held to the provision in the HDO setting a 60-day deadline for resolution of the case.

stating that “it is not possible to do this in 60 days.”<sup>24</sup> At that time, the Presiding Judge also indicated that the case would be considered *de novo*.<sup>25</sup> WealthTV has not offered any explanation as to why it did not seek reconsideration of the HDO after either the release of the October 23 Order or after the October 27 pre-hearing conference.<sup>26</sup>

Under the circumstances, WealthTV’s claim that it had good cause for not filing its Motion on a timely basis cannot be sustained. Indeed, if the “good cause” waiver standard is stretched so thin as to allow a hearing participant to seek Media Bureau reconsideration of an HDO any time a Presiding Judge issues a ruling with which it disagrees, the entire hearing process would become a sham. Hearing participants would be at liberty to seek reconsideration of an HDO at every stage of the process, including up to the day that the ALJ is prepared to render a decision. ALJs effectively would be stripped of any decision-making authority whatsoever, and the hearings themselves would continue interminably, as the parties would have to wait for the Media Bureau to weigh in on whether a particular evidentiary ruling or other interlocutory order justifies reconsideration of the underlying HDO. The very purpose of Section 1.301 of the Commission’s rules, which limits the types of ALJ interlocutory rulings that are appealable, is to foster efficient hearings and prevent parties from appealing every ALJ decision throughout the process as a matter of right.

According to WealthTV, the Media Bureau has the authority to act on its own initiative to revoke the HDO in order to “further the public interest in the orderly administration of

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<sup>24</sup> *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, MB Docket No. 08-214, transcript of pre-hearing conference held on October 27, 2008, at 38.

<sup>25</sup> *Id.* at 48.

<sup>26</sup> Even if it had waited until October 30, 2008, the date on which the Presiding Judge issued the order that memorialized the suspension of the original schedule, WealthTV had ample opportunity to file a timely reconsideration petition by the November 10 deadline. *See In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Order of Arthur I. Steinberg, FCC 08M-45, MB Docket 08-214 (rel. Oct. 30, 2008).

justice...”<sup>27</sup> However, WealthTV has failed to provide any support to justify such an extraordinary action. In fact, the “orderly administration of justice” commands that the proceeding remain under the purview of the ALJ so that the findings of fact can take place in an efficient manner, without undermining the integrity of the hearing process itself. As the Commission has concluded in the context of a request for appeal of a Hearing Examiner’s interlocutory ruling, “[t]his rule is designed to ensure orderly procedure and to prevent the almost interminable delays which could take place if proceedings hereto be stayed every time a party is dissatisfied with an Examiner’s ruling on interlocutory matters and seeks to have either the Commission or the Review Board to pass upon the ruling.”<sup>28</sup> Accordingly, there is no possible rational justification for granting the waiver requested by WealthTV that would establish a predictable, workable standard for non-discriminatory resolution of future cases.<sup>29</sup>

Moreover, even if there was a valid procedural vehicle for the Media Bureau to engage in an untimely reconsideration of the HDO, WealthTV has not advanced any argument or facts to support reversal of the Bureau’s conclusion that WealthTV’s complaint could not be decided without additional fact finding beyond the existing record.<sup>30</sup> Indeed, WealthTV’s own behavior subsequent to the issuance of the HDO is flatly inconsistent with its request that the Media Bureau reverse its express determination “that the pleadings and supporting documentation present several factual disputes, such that we are unable to determine on the basis of the existing records whether we can grant relief based on these claims.”<sup>31</sup> For example, since the issuance of the HDO, WealthTV has tacitly acknowledged the inadequacy of the current record by

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<sup>27</sup> Motion at 4.

<sup>28</sup> *Communications Satellite Corp.*, Memorandum Opinion and Order, 32 FCC 2d 533, ¶ 4 (1971).

<sup>29</sup> See *WAIT Radio*, *supra*, 418 F.2d at 1159.

<sup>30</sup> See, e.g., *Son Broadcasting*, *supra*, at ¶ 9 (once a matter is designated for hearing, the Commission will reassert jurisdiction only where the circumstances leading to the designation for hearing “have become so significantly altered” as to justify resolution of the matter without a hearing).

designating certain new exhibits and an additional expert witness that were not available to the Media Bureau as of the date the HDO was issued.<sup>32</sup> Nevertheless, WealthTV is intent on having the Media Bureau do what it already said it would not and could not do: decide this case based on the record before it at the time of the HDO.<sup>33</sup>

The cases cited by WealthTV in support of its Motion do not stand in any way for the proposition that the Media Bureau has authority to revoke the HDO or that an ALJ has anything other than “entirely” plenary authority to conduct the course of the proceeding,<sup>34</sup> especially when the hearing process is well underway.<sup>35</sup> In *Mega Media, Ltd.*,<sup>36</sup> the HDO was not revoked in order to allow the case to be resolved at the Bureau level; rather, it became moot because the parties settled their dispute. And in *Caballero Spanish Radio, Inc.*,<sup>37</sup> the HDO was rescinded as a procedural formality while additional matters were considered at the Bureau level; the decision was expressly intended as a temporary measure, not as a predicate for a decision on the merits by

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<sup>31</sup> HDO at ¶ 7.

<sup>32</sup> See *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Herring Broadcasting, Inc. d/b/a WealthTV’s Second Designation of Exhibits, MB Docket 08-214 (filed Nov. 10, 2008) and *In the Matter of Herring Broadcasting Inc., d/b/a WealthTV*, Herring Broadcasting, Inc. d/b/a WealthTV’s Second Designation of Witnesses, MB Docket 08-214 (filed Nov. 13, 2008).

<sup>33</sup> On the eve of the deadline for filing the instant Opposition, WealthTV filed a “Supplement” to its Motion, which failed to provide any new or additional justification for granting the relief sought, and indeed merely reiterated WealthTV’s unsubstantiated claim that its due process rights would somehow be impinged through a full and fair administrative hearing, even though this is precisely what WealthTV had requested in its Complaint and Reply. See n. 5, *supra*. As demonstrated herein, and as the Media Bureau previously concluded, due process calls for WealthTV’s claims to be evaluated by providing each party with the panoply of devices available in a hearing setting. WealthTV also provides no support for its claim, in the Supplement at 4, that “the cycle for a final decision may well have these complaints pending for nearly two years before the Commission, or more.” There is nothing in any of the ALJ Orders to date suggesting that it would take seven months or more for the ALJ to complete the hearing and issue a Recommended Decision. Finally, it certainly is odd for WealthTV to suggest, in the Supplement at 3, that the Media Bureau has “greater resources” available to it to resolve the factual disputes herein. The Supplement does not proffer any new evidence to demonstrate why the Media Bureau should upset its conclusion set forth in the HDO that the ALJ was indeed better equipped for such a task.

<sup>34</sup> See Motion at 3.

<sup>35</sup> Among other things, the Presiding Judge already has held two pre-hearing conferences and ruled on preliminary motions, and WealthTV twice has filed designations of witnesses and exhibits.

<sup>36</sup> 5 FCC Rcd 2528 (MMB 1990).

<sup>37</sup> MM Docket 84-967, 1984 FCC Lexis 1659 (MMB 1984).

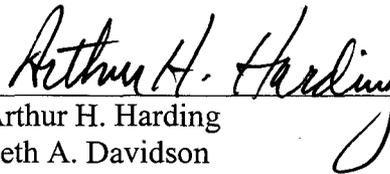
the Bureau.<sup>38</sup> In short, there is no precedential support, nor any grounds cited, for the extreme action sought by WealthTV.

**CONCLUSION**

For the foregoing reasons, the Motion should be denied. Not only does the Media Bureau not have the jurisdiction to review the Motion, but also WealthTV has failed to demonstrate why the Media Bureau should overturn the findings articulated in the HDO. Moreover, the Motion is procedurally defective because none of the alternative theories posited for accepting a late-filed petition for reconsideration pass muster. Finally, there is no basis for the Bureau to conclude that the ALJ lacks the plenary authority to adopt the rulings in the November 20 MO&O.

Respectfully submitted,

**TIME WARNER CABLE INC.**



Arthur H. Harding  
Seth A. Davidson  
Micah M. Caldwell  
FLEISCHMAN AND HARDING LLP  
1255 23rd Street, NW  
Eighth Floor  
Washington, DC 20037  
(202) 939-7900

Jay Cohen  
Henk Brands  
Samuel E. Bonderoff  
PAUL WEISS RIFKIND WHARTON &  
GARRISON LLP  
1285 Avenue of the Americas  
New York, NY 10011  
(212) 373-3163

Dated: December 4, 2008

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<sup>38</sup> WealthTV also argued that the Bureau could act on its Motion as an “informal request” not subject to the otherwise applicable procedural limitations. However, the one case cited by WealthTV in support of this argument actually denied the relief sought by the petitioner. *In the Matter of Amendment of Part 2 of the Commission’s Rules to Allocate Spectrum Below 3 GHz for Mobile and Fixed Services to Support the Introduction of New Advanced Wireless Services*, Order on Reconsideration, 22 FCC Rcd 19833 (WTB 2007), cited by Motion at 4-5.

**CERTIFICATE OF SERVICE**

I, Glenda V. Thompson, a secretary at the law firm of Fleischman and Harding LLP, hereby certify that copies of the foregoing "Opposition To Herring Broadcasting, Inc.'s Motion For Revocation of Hearing Designation" were served this 4<sup>th</sup> day of December, 2008, via email, upon the following:

Kris Anne Monteith, Esq.  
Chief, Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

The Honorable Arthur I. Steinberg  
Administrative Law Judge  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

The Honorable Richard L. Sippel  
Administrative Law Judge  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Monica Desai, Esq.  
Chief, Media Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

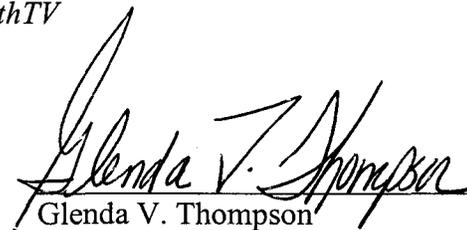
Ms. Mary Gosse  
Office of Administrative Law Judges  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Kathleen M.H. Wallman, Esq.  
Kathleen Wallman, PLLC  
9332 Ramey Lane  
Great Falls, VA 22066

Gary Schonman, Esq.  
Elizabeth Mumaw, Esq.  
Enforcement Bureau  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Geoffrey M. Klineberg, Esq.  
Priya R. Aiyar, Esq.  
Derek T. Ho, Esq.  
Kellogg, Huber, Hansen, Todd,  
Evans & Figel P.L.L.C.  
1615 M Street, N.W. – Suite 400  
Washington, D.C. 20036

*Counsel for Herring Broadcasting, Inc. d/b/a  
WealthTV*

  
Glenda V. Thompson